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Supreme Court, U.S.
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No. 04-367

In The
Supreme Court of the United States

EARL DeWAAL,

Petitioner,

v.

JOSEPH F. ALSTON, Superintendent, Rainbow Bridge National Monument; ROBERT G. STANTON, Director, National Park Service; and the NATIONAL PARK SERVICE, an agency of the U.S. Department of the Interior,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. PETITIONER HAS STANDING TO CHALLENGE ENDORSEMENT OF A RELIGIOUS SYMBOL.

The Tenth Circuit's decision holding that Mr. DeWaal lacks standing merits this Court's review. Petition for *Writ* of *Certiorari* ("Petition"), 3. This Court has held that Establishment Clause plaintiffs have standing when governments endorse religious symbols in public places, *e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). *Id.* at 13. Five Circuit Courts of Appeals have held that Establishment Clause plaintiffs have standing when they come into direct personal contact with offensive government endorsement of religious symbols in public places, *e.g.*, *Suhre v. Haywood County,* 131 F.3d 1083 (4th Cir. 1997). Petition, 14. Three Circuits have held that Establishment Clause plaintiffs have standing when they alter their behavior as a result of government endorsement of religious symbols in public places, *e.g.*, *Freedom From Religion v. Zielke*, 845 F.2d 1463 (7th Cir. 1988). Petition, 15.

Nonetheless, the Tenth Circuit held, in *DeWaal v. Alston*, 98 Fed.Appx. 711 (10th Cir. 2004), that Mr. DeWaal lacked standing even though it acknowledged that Mr. DeWaal had come into direct personal contact with the National Park Service's ("NPS") treatment of Rainbow Bridge as god incarnate and its policy that visitors should not approach the "Rainbow God." *Natural Arch and Bridge Society v. Alston*, 209 F.Supp.2d 1207, 1225 (D.Utah 2002). The Tenth Circuit's ruling conflicts with the holdings of this Court and those of all Circuits that have ruled on who has standing to chal'enge government endorsement of a religious symbol in a public place. Moreover, this Court has made it clear that federal land may not be closed to

the public for purposes of religious activity. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). Similarly, in this case, the federal government may not "exclude human activity" simply because some American Indians consider Rainbow Bridge sacred. This petition should be granted to resolve this conflict.

Respondents incorrectly claim that Mr. DeWaal did not approach Rainbow Bridge as a consequence of his own intervening "genuine and independent private choice." Brief for the Respondents in Opposition ("Opposition"), 9. Instead, Mr. DeWaal did not approach Rainbow Bridge because: (1) he was distinctly told not to by a uniformed NPS Interpreter/Ranger, App. 7, 30-31; and (2) he was threatened with a citation by the Supervising NPS Ranger if he did so. App. 5-7, 33. As a direct consequence of these official communications, Mr. DeWaal "felt compelled" not to approach or walk beneath Rainbow Bridge, although he wanted to do so. App. 6-7, 33. Therefore, Mr. DeWaal's decision was not his "choice". As a result, under the holdings of this Court and three of the Circuits, Mr. DeWaal has standing. The contrary decision of the Tenth Circuit conflicts with those holdings.

Furthermore, assuming *arguendo* that Mr. DeWaal did not "alter his behavior," nevertheless Mr. DeWaal did come into direct personal contact with government endorsement of a religious symbol in a public place. As a result, under the holdings of this Court and five of the Circuits, Mr. DeWaal has standing. The contrary decision of the Tenth Circuit conflicts with those holdings.

Finally, contrary to Respondents' assertions, the demand by the NPS that Mr. DeWaal alter his conduct was not a "simple governmental request to refrain from a

certain activity," Opposition, 6, but rather "an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF OTHER CIRCUITS BECAUSE THIS CASE INVOLVES A RELIGIOUS SYMBOL ON GOVERNMENT PROPERTY.

Respondents contend that the Tenth Circuit's decision does not conflict with the decision of any other Circuit because the cases cited by Mr. DeWaal involved "governmental displays of sectarian religious symbols on government property." Opposition, 7. Respondents incorrectly claim that this case does not involve any religious item or symbol. Although Respondents are correct that Rainbow Bridge is a natural geological formation, American Indians believe it is God incarnate. In deference to that belief the NPS has gone to great lengths to ensure that visitors show the proper "respect" for this American Indian belief and in turn, alter their behavior. *See* Rainbow Bridge National Monument June 1993 General Management Plan.

In the cases cited by Mr. DeWaal, Respondents object not to the particular symbol or words, but instead to the religious significance of those symbols or words. Both *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997), and *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), involve challenges to placement of the Ten Commandments in a public place. Although the Ten Commandments are just words carved in stone, Christians and Jews believe that the Ten Commandments came directly from God. It is this belief, and the government's endorsement of it, that makes placement of a protrayal of

the Ten Commandments in a public place a violation of the Establishment Clause.

At Rainbow Bridge it is not the geological formation to which Mr. DeWaal objects, it is instead the endorsement by the NPS of its religious significance to American Indians that he finds constitutionally offensive. The NPS did not "display" Rainbow Bridge, it is, of course, a naturally occurring geological formation. However, like the government in the cases cited by Mr. DeWaal, the NPS is endorsing the religious significance of that physical form, thereby violating the Establishment Clause. The Tenth Circuit's failure to so rule conflicts with the decision of other Circuits that have banned endorsement of religious symbols in public places.

III. PETITIONER'S ESTABLISHMENT CLAUSE CHALLENGE MERITS REVIEW BY THIS COURT.

Respondents incorrectly cite to *Zorach v. Clauson*, 343 U.S. 306 (1952) when claiming that Mr. DeWaal's challenge does not involve a violation of the Establishment Clause. Opposition, 10. The correct test, as determined by this Court more than thirty years ago, is set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): Under *Lemon*, the Establishment Clause requires that any government practice that touches upon religion must: (i) have a secular purpose; (ii) neither advance nor inhibit religion in principal or primary effect; and (iii) avoid excessive entanglement with religion. *Id.* at 612-613. Further, "[t]he state may not adopt programs of practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute." *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963).

First, the practices adopted by the NPS at Rainbow Bridge aid the religious beliefs of American Indians. From the adoption of the 1993 General Management Plan and the placement of official NPS signs identifying Rainbow Bridge as a "sacred" site and directing visitors to act in a specified manner to providing visitors with interpretive speeches pertaining to the spiritual and religious values of the site, the NPS's support for American Indian religion is obvious. Petition, 4-5. Because these practices not only touch upon religion, but were adopted solely for the purpose of protecting the American Indian religion, they do not have a secular purpose.

Second, the "principal [and] primary effect" of the NPS's actions is to advance religion. The NPS admits that the "actual purpose" of its policy is to promote "respect" for the religious beliefs of American Indians about Rainbow Bridge. It candidly admits, for example, that its policy is to manage the Rainbow Bridge "as a traditional cultural property" in response to American Indian beliefs about the "religious significance of the site."[1] *See* Rainbow Bridge National Monument June 1993 General Management Plan, Development Concept Plan Interpretive Prospectus, 1993. Furthermore, the NPS declares that "[p]eople walking beneath the bridge is [sic] particularly offensive to the Navajo people and other American Indian tribal members" and "[i]nappropriate visitor use of the site

[1] The 1993 GMP also mandated the creation of a "visitor-use monitoring" program to ensure the effectiveness of the NPS's efforts to "discourage use below the bridge" due to "the significance of the bridge to American Indians. . . ." Rainbow Bridge National Monument June 1993 General Management Plan. Development Concept Plan Interpretive Prospectus, 1993. At the time the Complaint was filed, the monitoring program had not yet been implemented.

creates an atmosphere that detracts . . . from the American Indian view of how the site should be treated . . . ." *Id.* at 6, 8. As a result, the NPS determined that "the religious and sacred significance of the area to various American Indian tribes" is "a strong factor in determining the way the [Rainbow Bridge] is managed." *Id.* at 1.

Last, the NPS has failed to avoid excessive entanglement with religion; its actions, in fact, foster and promote American Indian religion. The "central lesson" of this Court's Establishment Clause jurisprudence is that the government must maintain "neutrality towards religion." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 845 (1995). At Rainbow Bridge, the NPS has failed to maintain neutrality; instead, it endorses the sacred nature of Rainbow Bridge and demands that visitors "respect" that belief by not approaching the "Rainbow God."

As a result of its actions, the NPS has violated the Establishment Clause.

IV. TWO CASES NOW BEFORE THIS COURT ADDRESS THE SAME ISSUES AS PRESENTED BY THIS CASE.

Two cases now before this Court for a determination of their merits speak to the very issue that Mr. DeWaal asks the Court to address in his petition. *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (2004); *ACLU of KY, et al., v. McCreary County, et al.*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 346 (2004). The factual question in these two cases is whether the display in a public place of a monument that includes the Ten Commandments, which Jews and Christians

believe were written in stone by God, constitutes unconstitutional government endorsement of religion. In Mr. DeWaal's case, the question is whether the government's endorsement of the religious beliefs of some American Indians that a geological feature is god incarnate or the "Rainbow God" is unconstitutional. Neither the monuments in *Van Orden* or *McCreary County*, nor the geological feature in *DeWaal* are, in and of themselves, offensive to the Constitution; however, when a government endorses the significance affixed by religious adherents to any of these pieces of stone, that government runs afoul of the Establishment Clause.

This Court may find, from the facts of *Van Orden* and *McCreary County*, that in those cases the government has not endorsed the religious significance – to Jews and Christians – of those stone monuments, neither opining as to what Judeo-Christian orthodoxy believes nor attempting to enforce that orthodoxy. Such a finding is impossible in the instant case, however, because the NPS not only aggressively espouses and endorses the view of some American Indians that Rainbow Bridge is god incarnate, it enforces that orthodoxy by commanding that visitors show "respect" for the "Rainbow God."

Given that the question in the instant case is the same as that presented in both *Van Orden* and *McCreary County*, this Court should hold Mr. DeWaal's petition aside until those cases are decided. At that time, certiorari should be granted in Mr. DeWaal's case and the case should be reviewed and remanded to the Tenth Circuit with instructions to follow the Court's rulings in *Van Orden* and *McCreary*.

CONCLUSION

For the foregoing reasons, the Petition for *Writ of Certiorari* should be granted.

Respectfully submitted,

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